

Anti-Money Laundering Alert

FinCEN Pursues its Next Steps, Posting its Priorities and Pondering a No-Action Process

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The Financial Crimes Enforcement Network (FinCEN) has completed two of its early benchmark obligations arising out of the recently passed Anti-Money Laundering Act of 2020 (the “AML Act”), which we previously wrote about [here](#).

First, pursuant to the AML Act, FinCEN [published](#) the first government-wide list of anti-money laundering (AML) and countering the finance of terrorism (“AML/CFT”) priorities (the “Priorities”).¹ The Priorities identify and describe the most significant AML/CFT threats facing the United States that financial institutions should be focused on to effectively prioritize their compliance resources and manage their risks. “In no particular order,” FinCEN identified the following eight priorities:

- 1) Corruption;
- 2) Cybercrime, including Relevant Cybersecurity and Virtual Currency Considerations;
- 3) Terrorist Financing—both foreign and domestic;
- 4) Fraud;
- 5) Transnational criminal organization activity;
- 6) Drug trafficking organization activity;
- 7) Human trafficking and human smuggling; and
- 8) Proliferation financing

Second, FinCEN [reported](#) to Congress on June 28, 2021, about a potential no-action letter process. The report concludes that regulated entities will benefit from a no-action letter process, and that FinCEN should “plan towards” creating such a process, “subject to resource limitations and competing priorities.”

Read together, these publications offer key insights into how financial institutions might expect FinCEN to approach future enforcement actions and examinations, and hint that the timing of a rulemaking process implementing a robust no-action letter process might be contingent on how much money Congress allocates to FinCEN in next year’s budget.

I. National AML/CTF Priorities

The AML Act required that FinCEN establish a set of national priorities for AML/CTF policy by June 30, 2021, to promulgate related regulations no later than 180 days thereafter, and to update its priority list at least every four years. The Act requires that, during regulatory exams, regulators must consider the incorporation of these priorities into a financial institution’s compliance program.

For each priority, the publication highlights key threat trends and compiles previously published information resources. Recognizing that not every priority will apply to every covered financial institution, FinCEN recommends that each covered institution review and incorporate future regulations in accordance with the institution’s broader risk-based AML program.

Some commentators have complained that FinCEN’s priorities are so broad that they encompass virtually every area of transnational crime and offer little actual guidance on where to focus compliance resources. While that may be a valid take, and while we anticipate that FinCEN will put more meat on the priorities’ bones when it promulgates regulations by the end of 2021, we do think there are important actions for financial institutions to take now.

¹ Most recently in 2018, the Treasury Department released a “risk assessment” which identifies money laundering threats to the U.S. and includes many of the same topics that are outlined in the new AML Priorities. See *National Money Laundering Risk Assessment*, TREASURY (Dec. 2018), https://home.treasury.gov/system/files/136/2018NMLRA_12-18.pdf.

Key Takeaways:

- 1. Don't wait.** FinCEN has effectively given financial institutions a six-month head start from June 30th to consider these priorities before regulations become effective. FinCEN and other regulators explicitly recommend that financial institutions use this grace period to evaluate how to incorporate these priorities into their AML compliance programs, conduct a risk assessment to evaluate the impact of these priorities on their products, customers, and regions in which they operate, and share these priorities with their upper management. Risk assessments, in particular, can take time, and so we recommend that financial institutions start refreshing their assessments now.
- 2. Check yourself.** Every priority is accompanied by references to previous advisories, or guidance on their respective subjects. Financial institutions should review those publications and ensure they are meeting current regulatory expectations regarding these priorities. All of the previous guidance cited by FinCEN can be found in the appendix below.
- 3. Two-for-one.** Specifically for banks and, "although not required by the AML Act," the federal banking agencies (as opposed to only FinCEN) confirmed that additional regulations will be forthcoming to address how these priorities will fit into banks' Bank Secrecy Act requirements. This will apparently be in addition to the FinCEN regulations that *are* required and were sign-posted in the AML Act.
- 4. Don't panic.** Despite the need for preparation and consideration of the impact of these priorities, for now these publications do not make any *immediate* regulatory changes. Financial institutions are not yet explicitly required to incorporate these priorities into their risk-based compliance programs. In their explanatory statements, FinCEN and the federal banking agencies explicitly confirmed that consideration and inclusion of these priorities in compliance programs will not be an examination standard until they promulgate regulations.

The AML Priorities:

- 1. Corruption.** Despite being listed in "no particular order," corruption comes first on FinCEN's list. This is no coincidence, since these priorities were published in the immediate wake of President Biden's [Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest](#). The memo identifies combating global corruption—including across global financial systems—as a top U.S. national security priority. This top-listed priority also comes on the heels of recent corruption enforcement actions, and reinforces the [Biden administration's broader focus on anti-corruption](#).
- 2. Cyber-crime, including Relevant Cybersecurity and Virtual Currency Considerations.** This priority expands on [previous regulatory guidance](#) by discussing the use of cryptocurrency as [payment for illicit online activity](#), including [ransomware attacks](#). FinCEN noted that financial institutions are well-positioned to identify suspicious cyber activity and should share such information with one another under a safe harbor provision of the BSA. Effective compliance in this area may require financial institutions' AML compliance teams to work closely with their cybersecurity teams. The [specific inclusion of cryptocurrency](#) follows several high-profile ransomware attacks, like the Colonial Pipeline hack, in which the criminals were paid out in bitcoin. It also is consistent with Treasury Secretary Yellen's [views](#) that cryptocurrencies are the preferred currency for illicit financial transactions, including terrorist financing. As an additional indicator for how seriously FinCEN takes virtual currency, the agency recently hired its first ever [Chief Digital Currency Advisor](#).
- 3. Terrorist financing—both foreign and domestic.** FinCEN's announcement stressed covered institutions' "existing obligations to identify and file suspicious activity reports on potential terrorist financing transactions, as appropriate, and follow applicable requirements for reporting violations requiring immediate attention." The priorities specifically note the ongoing threat of domestic terrorism, primarily from white supremacists, and the need terrorist groups have for access to financial networks to fund their activities.
- 4. Fraud.** Fraud generates the bulk of illicit proceeds in the United States and FinCEN highlighted healthcare fraud in particular, [with the COVID-19 pandemic](#) requiring attention toward [schemes involving economic impact payments, health insurance, unemployment insurance, counterfeit vaccines, and more](#).

The AML Priorities (continued):

5. Transnational criminal organization activity.

The focus on TCOs is unique on the list because it involves groups of people as opposed to types of illicit activity. FinCEN explains its focus on these groups by observing that TCOs commit acts in other identified priority areas like cybercrime, drug trafficking, fraud, and human trafficking. FinCEN lists Mexican and Russian TCOs as high priorities and says that Africa- and Asia-based TCOs become greater threats each year.

6. Drug trafficking organization activity.

This priority includes drugs and drug proceeds laundered in or through the United States using front companies to repatriate those proceeds to the countries that were the source of the drugs.

7. Human trafficking and human smuggling.

[Human rights abuses](#) use a variety of mechanisms to move illicit proceeds, including cash smuggling by individual victims and sophisticated operations using professional money laundering networks and TCOs. FinCEN identified this priority just as other executive departments—including State, Treasury, Commerce, and Homeland Security—[warn businesses](#) of supply-chain-related human rights risks, including the forced labor of Muslim minority groups in the Xinjiang Uyghur Autonomous Region (XUAR) in China. Further highlighting this priority's importance, the [Uyghur Forced Labor Prevention Act](#) recently passed in the U.S. Senate. The language in this Act would assume, unless disproven, that imports from XUAR are prohibited under Section 307 of the Tariff Act of 1930 (19 U.S.C. 1307) and therefore not entitled to entry at any port of the U.S. To date, the proposed Uyghur Forced Labor Prevention Act has received bipartisan support, and many experts believe it is likely to pass in some form.

8. Proliferation financing.

FinCEN notes that networks seek to exploit the U.S. financial system to acquire weapons of mass destruction or further state-sponsored weapons programs. Global correspondence banking is a "principal vulnerability and driver of proliferation financing risk within the United States due to its central role in processing U.S. dollar transactions, which comprise a substantial proportion of cross-border trade."

II. No-Action Letters

The AML Act required FinCEN to report to Congress on whether it should establish a process for the issuance of no-action letters. A no-action letter, as FinCEN describes it, "is generally understood to be a form of an exercise of enforcement discretion wherein an agency issues a letter indicating its intention not to take enforcement action against the submitting party for the specific conduct presented to the agency." FinCEN completed its 15-page report on June 28, 2021. Other regulatory agencies, such as the SEC and CFPB, have well-developed no-action letter programs.

FinCEN's Conclusion: The report concludes that FinCEN should undertake a rulemaking to establish a no-action letter process, with the timing "subject to resource limitations and competing priorities." FinCEN believes that, properly resourced, a no-action letter process might enable creativity and innovation in technological developments that ultimately could serve to enhance BSA compliance.

But under the proposed no-action letter process, it could take 90 days to issue a letter in simple cases, or over a year in novel, complex, or sensitive cases. And FinCEN clarified: the agency "does not [currently] have adequate resources and personnel to receive, process, and adjudicate no-action letter submissions"; so, without more Congressional funding, no-action letters will either have unreasonably long processing times or will divert resources from other high-priority work. Nonetheless, FinCEN concluded that it should "plan towards" a rulemaking to establish a no-action letter process.

Consideration of Shared No-Action Responsibility:

Given FinCEN's parallel or overlapping authority with other entities, FinCEN considered whether a novel cross-regulator no-action letter process might be appropriate. A cross-regulator no-action letter process would be convenient and FinCEN considers itself a logical hub for such requests, "given FinCEN's substantial expertise in the design, implementation, and enforcement of AML and CFT laws and regulations and as the administrator of the BSA." However, the report recommends against adopting a cross-regulator process because it would require the express concurrence of other regulators, would create a resource-intensive interagency process, and would be slower than a FinCEN-only process. The report does conclude that FinCEN's no-action letter process should include consultation with other agencies "as needed and appropriate," since a FinCEN no-action letter might impact agencies with parallel or delegated authority. It remains to be seen how much FinCEN will coordinate with other financial regulators following passage of the AML Act.

III. Conclusion

FinCEN's recent publications mark some of the first steps in a period of increased AML regulatory action stemming from the AML Act and presidential attention. The Biden administration's focus on corruption and the apparent increase in coordination among banking regulators seems to have set the scene for the increased cooperation between regulators and industry that the AML Act encourages. The National AML Priorities, while broad, offer glimpses into regulators' focus in the coming years, and—when read together with the no-action letter report—seems to suggest that the current administration sees Congress as approaching a crossroads: fund financial regulation as a national security priority and realize the goals of the AML Act, or maintain the status quo. For financial institutions, it's a very good time to examine their existing AML compliance programs in light of these recent developments.

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Appendix (Previous Guidance & Advisories Cited by FinCEN)

1. Corruption

- *Advisory to Financial Institutions on the Risk of Proceeds of Corruption from Nicaragua*, FINCEN (Oct. 4, 2018) https://www.fincen.gov/sites/default/files/advisory/2018-10-04/Nicaragua_Advisory_FINAL_508_0.pdf
- *Advisory on Political Corruption Risks in South Sudan*, FINCEN (Sept. 6, 2017), https://www.fincen.gov/sites/default/files/advisory/2017-09-06/South%20Sudan%20Advisory_09-06-2017_0.pdf
- *Advisory on Widespread Public Corruption in Venezuela*, FINCEN (Sept. 20, 2017), <https://www.fincen.gov/sites/default/files/advisory/2017-09-20/FinCEN%20Advisory%20FIN-2017-A006-508%20Compliant.pdf>

2. Cybercrime, including Relevant Cybersecurity and Virtual Currency Considerations

- *Advisory on Ransomware and the Use of the Financial System to Facilitate Ransom Payments*, FINCEN (Oct. 1, 2020), <https://www.fincen.gov/sites/default/files/advisory/2020-10-01/Advisory%20Ransomware%20FINAL%20508.pdf>
- *Advisory on Cybercrime and Cyber-Enabled Crime Exploiting the Coronavirus Disease, 2019 (COVID-19) Pandemic*, FINCEN (July 30, 2020) <https://www.fincen.gov/sites/default/files/advisory/2020-07-30/FinCEN%20Advisory%20Covid%20Cybercrime%20508%20FINAL.pdf>

3. Terrorist Financing—both foreign and domestic

- *National Terrorist Financing Risk Assessment*, TREASURY (June 12, 2015) <https://home.treasury.gov/system/files/246/National-Terrorist-Financing-Risk-Assessment-06-12-2015.pdf>
- *National Terrorist Financing Risk Assessment*, TREASURY (Dec. 20, 2018) https://home.treasury.gov/system/files/136/2018ntfra_12182018.pdf
- *National Strategy for Combatting Terrorist and Other Illicit Financing*, TREASURY (Feb. 6, 2020) <https://home.treasury.gov/system/files/136/National-Strategy-to-Counter-Illicit-Financev2.pdf>

4. Fraud

- *Advisory to Financial Institutions on E-Mail Compromise Fraud Schemes*, FINCEN (Sept. 6, 2016) <https://www.fincen.gov/sites/default/files/advisory/2016-09-09/FIN-2016-A003.pdf>
- *Updated Advisory on Email Compromise Fraud Schemes Targeting Vulnerable Business Practices*, FINCEN (July 16, 2019) <https://www.fincen.gov/sites/default/files/2019-07/Updated%20BEC%20Advisory%20FINAL%20508.pdf>
- *FinCEN COVID-19-Related Advisories and Alerts*, FINCEN <https://www.fincen.gov/coronavirus>

5. Transnational criminal organization activity

- *National Money Laundering Risk Assessment*, TREASURY (Dec. 2018) https://home.treasury.gov/system/files/136/2018NMLRA_12-18.pdf

6. Drug trafficking organization activity

- *Advisory to Financial Institutions on Illicit Financial Schemes and Methods Related to the Trafficking of Fentanyl and Other Synthetic Opioids*, FINCEN (Aug. 21, 2019) <https://www.fincen.gov/sites/default/files/advisory/2019-08-21/Fentanyl%20Advisory%20FINAL%20508.pdf>

7. Human trafficking and human smuggling

- *Advisory Guidance Recognizing Activity that May be Associated with Human Smuggling and Human Trafficking*, FINCEN (Sept. 11, 2014) <https://www.fincen.gov/sites/default/files/advisory/FIN-2014-A008.pdf>
- *Supplemental Advisory on Identifying and Reporting Human Trafficking and Related Activity*, FINCEN (Oct. 15, 2020) https://www.fincen.gov/sites/default/files/advisory/2020-10-15/Advisory%20Human%20Trafficking%20508%20FINAL_0.pdf

8. Proliferation financing

- OFAC, *Advisory on the Use of Exchange Houses and Trading Companies to Evade U.S. Economic Sanctions Against Iran*, TREASURY (Jan. 10, 2013) https://home.treasury.gov/system/files/126/20130110_iran_advisory_exchange_house.pdf
- OFAC, *Guidance to Address Illicit Shipping and Sanctions Evasion Practices*, TREASURY (May 14, 2020) https://home.treasury.gov/system/files/126/05142020_global_advisory_v1.pdf
- *Advisory on the Iranian Regime's Illicit and Malign Activities and Attempts to Exploit the Financial System*, FINCEN (Oct. 11, 2018) <https://www.fincen.gov/sites/default/files/advisory/2018-10-12/Iran%20Advisory%20FINAL%20508.pdf>
- *Advisory on North Korea's Use of the International Financial System*, FINCEN (Nov. 2, 2017) <https://www.fincen.gov/sites/default/files/advisory/2017-11-02/DPRK%20Advisory%20FINAL%20508%20C.pdf>
- OFAC, *Sanctions Risks Related to Petroleum Shipments Involving Iran and Syria*, TREASURY (Mar. 25, 2019) https://home.treasury.gov/system/files/126/syria_shipping_advisory_03252019.pdf
- OFAC, *Sanctions Risks Related to North Korea's Shipping Practices*, TREASURY (Feb. 23, 2018) https://home.treasury.gov/system/files/126/dprk_vessel_advisory_02232018.pdf
- *Advisory on the Financial Action Task Force-Identified Jurisdictions with Anti-Money Laundering and Combating the Financing of Terrorism and Counter-Proliferation Deficiencies*, FINCEN (Mar. 11, 2021) <https://www.fincen.gov/sites/default/files/advisory/2021-03-11/FATF%20February%202021%20Advisory%20FINAL%20508.pdf>